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Dean E. Park v. Alta Ditch & Canal Company, a Corporation; Metropolitan Water District of Orem, A Public Corporation, and Orem City, A Municipal Corporation : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

DEAN E. PARK,

Plaintiff and Appellant,

vs.

ALTA DITCH & CANAL COMPANY, a corporation; METROPOLITAN WATER DISTRICT OF OREM, a public corporation, and OREM CITY, a municipal corporation,

Defendants and Respondents.

Case No. 11345

APPELLANT'S BRIEF

An Appeal from the Judgment of the Fourth District Court for Utah County Honorable Joseph E. Nelson, Judge

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STATEMENT OF KIND OF CASE

This is an action to quiet title to the appellant's water and ditch rights, evidenced by two shares of stock in Alta Ditch and Canal Company, a mutual irrigation company, against such company and against the Metropolitan Water District of Orem and Orem City, claimants of the use of such water under lease and exchange agreements. Orem City counterclaimed for payment for water delivered to the appellant.

DISPOSITION IN LOWER COURT

The trial court dismissed the amended complaint, holding that the appellant's only right against the Alta Ditch and Canal Company was as owner of two shares of stock, that the agreements between such Company and Metropolitan Water District of Orem were valid and that the appellant's water right was subject thereto. The court also held that the appellant had no right to use or maintain his present connection with the Orem City pipeline. Orem City's counterclaim for payment for water delivered to the appellant from November 1, 1962 to October 1, 1967 was dismissed.

RELIEF SOUGHT ON APPEAL

The appellant seeks to reverse that part of the judgment of the trial court denying to him a decree quieting his title to his proportionate share of the water of Alta Spring, and denying his right to carry his water in the Orem City pipeline. He seeks affirmance of that part of the judgment dismissing Orem City's counterclaim.

STATEMENT OF FACTS

Alta Ditch and Canal Company, a corporation, will be hereinafter referred to as "Alta" and the respondents Metropolitan Water District of Orem and Orem City will be hereinafter collectively referred to as "Orem." A defunct corporation which preceded Alta will be referred to as "Old Alta".

Old Alta was incorporated in 1893 for the purpose of pooling the water rights of its stockholders for more convenient and efficient distribution of water. It was a typical, mutual irrigation type company. (Ex. 26). Its Charter expired on May 16, 1943. (Ex. 26). A new corporation having the same name and same articles of incorporation was organized in 1946. (Ex. 7). The appellant bought certificate No. 224 for two shares of stock in Old Alta from one Robert B. Calder in 1947. (Tr. 71). Calder's certificate was transferred from the certificate of Verena C. Crandall, No. 213, dated in 1945. (Ex. 13). This certificate was issued from certificate No. 202, dated November 4, 1943. (Ex. 13). Certificate No. 202 was issued from Certificate No. 195 which was dated February 20, 1943. (Ex. 13).

In 1950, two years after the appellant purchased his certificate of stock, a decree was entered in a suit entitled, "Orem City vs. Alta Ditch and Canal Co., et al., filed in the District Court of Utah County which involved the question as to whether Orem City, a stockholder in Old Alta, was entitled to its proportionate share of the water of the same Alta Spring as that involved in this case. The entire file is in evidence. (Ex. 3). It will be noted that Orem City won its case and the court quieted its title to its pro rata share of the water. (Ex. 3, File #2). In the decree dated March 24, 1950, appears the following significant provision:

> ". . . 8. That the new Alta Ditch and Canal Company has acquired no title in, or to, the said Alta ditch or water and has no right to control or

> liquidate said property or rights beyond that which may be accorded to it by common consent of the persons interested, the right to regulate and administer the property for the purposes of liquidation remaining with the old corporation until its winding up in accordance with the provision of this decree . . .'' Exhibit 3.

It is clear that in 1950, two years after the appellant purchased his stock, Alta (the new Alta referred to in the decree) had . . . ''acquired no title in or to, the said Alta ditch or water. . . . and had no right to control or liquidate its property . . . beyond that which may be accorded to it by *common consent* of the persons interested. . . .'' (Emphasis added).

In the meantime, before the entry of the decree quoted from above the appellant met with the City Council of Orem City on October 12, 1949, and made arrangements to have his proportionate part of the water of Alta Spring delivered to him through the Orem City 14-inch pipeline which carries the City's share of Alta Spring water from the spring, a distance of several miles to the City where it is used for municipal purposes. The minutes of the October 12, 1949 meeting are as follows:

> ''Dean E. Park was present to ask the Council to consider him tapping the 14-inch pipeline as proposed from the basin to the diversion unit just above the storage tank and running a line to his bowl for irrigation purposes. Mr. Park owns two shares of Alta Water and wished to have the City include his water with theirs and use it in regular turns each week, taking out the equivalent of two shares from the pipeline through a

meter and if more water is used then he would be charged for it. He was told that it was felt that the project could be worked out by a State Engineer and the City Engineer and that it would probably be agreeable with the Council."

Three days after the meeting of October 12, 1949, (Ex. 12) work on the facility to connect the appellant's water line with the Orem line began (Tr. 66, 67). Orem City Engineer Beckman at the direction of the Orem City Council designed the works and supervised construction (Tr. 11, 12, 29). From 1949 to the date of filing this suit the appellant diverted his share of Alta Spring water through the Orem City pipeline to his system constructed at an expense exceeding $24,000.00 (Tr. 64, 83).

At the time of the construction of the appellant's connection facilities mentioned above, the appellant was at the site with James Ferguson, president of Alta and Merrill Crandall and Howard Ferguson, directors. (Tr. 67, 68). James Ferguson testified that he recalled the meeting at the connection site, testified that he had known all about the appellant's pipeline and the fact that he had been getting Alta Spring water since 1949. (Tr. 167, 168, 171).

The appellant's pipeline was replaced with a larger diameter line in 1958 and a meter was installed. (Tr. 66, 74, 75). The record discloses no other changes in the system during the seventeen-year period from 1949 to 1966. Between 1949 and 1966 Alta made no objection to the diversion of appellant's water through the pipeline. (Tr. 76). He received a constant flow. (Tr. 151, 152).

The minutes of the City Council indicate no Orem transaction with appellant from October 12, 1949 to October 3, 1960. In a meeting on the last mentioned date the appellant's water connection was mentioned and it was "tabled for further research." (Ex. 12, p. 2). The minutes for May 8, 1961, show that the appellant appeared at the City Council meeting and reported his arrangement with the City for the connection. (Ex. 12, pp. 2, 3). On July 17, 1961, the City Council directed its attorney, Mr. Wentz, to draw up a formal contract with appellant. (Ex. 12, p. 3).

Mr. Wentz was called as a witness by the appellant. He produced a draft of an agreement which was offered and received in evidence. (Ex. 27). It provides that the appellant would transfer his water right and pipeline system to Orem City, and that upon such transfer he would take from the Orem City pipeline the quantity of water represented by his two shares of stock. If he diverted any water in excess of his entitlement he would pay for it. Mr. Wentz testified that the draft of contract was presented to the appellant but he refused it. (Tr. 179). The appellant denied that he had ever seen it. (Tr. 184).

The record is uncontradicted that Orem City did not bill the appellant for water from 1949 to August 1, 1966, (except for one bill in 1961 for $7.50 about which there is a controversy (Tr. 73, 74, 241, 242). Frank Ferguson, Orem City employee, testified that he had read the appellant's water meter regularly from 1960 to 1967. (Tr. 257-259)

Meter readings on the appellant's pipeline since 1962 are in evidence (Ex. 38) and records of the yield of Alta Spring are in evidence. (Ex. 11) Mr. Beckman, former City Engineer of Orem testified that based on the records in evidence he calculated that during the period of measurement the appellant had diverted through his pipeline 18,024,759 gallons less than his entitlement from Alta Spring. (Tr. 276-278). This excess went down the pipeline to the Orem City system. (Tr. 276)

In 1956 Orem and Alta entered into a written agreement for the leasing to Orem of all of Alta's Alta Spring water. (Ex. 4).

In 1958 Alta and Orem entered into an agreement by the terms of which Alta agreed to exchange its part of Alta Spring's summer water for Deer Creek Reservoir water plus a cash consideration. (Ex. 5). This was renewed in 1966. (Ex. 6).

In 1964 an additional agreement was made by the two parties reciting that "Orem and Alta are owners as tenants in common of Alta Springs, ditch, pipeline, right of use of waters and works, Orem being the owner of 34.8% and Alta being the owner of 65.18% of the same with Orem also owning 41 shares of Alta Stock in said 65.18%." The parties agreed to jointly expend some $32,000.00 to cover Alta Spring. (Ex. 31).

The summer water exchange agreement (Ex. 5) expired by its terms on November 1, 1965. When the irrigation season commenced in 1966 there was no exchange

agreement in effect and the stockholders in Alta received their pro-rata share of the spring water in turns. The water master, Cecil Ferguson, delivered appellant's water represented by his two shares into his pipeline to give him cullinary water. (Tr. 295, 296). The exchange agreement was later renewed. (Ex. 6).

The appellant, in his amended complaint, alleges ownership of two shares of stock in Alta which entitle him to that proportion of the water of Alta Spring which his share bears to the total number of shares outstanding and to a right to carry his share of the water through Alta's ditches, pipelines and other facilities. He further alleges the construction of his pipeline at great expense to connect to the Orem City line, the connection arrangement with Orem City and the other ultimate facts summarized above. (R. 49-53). Alta answered denying the allegations relating to the water rights of the appellant and counterclaimed for a decree declaring the validity of the lease and exchange agreements mentioned above. (R. 69-72). Orem denied that the appellant was entitled to carry water in the Orem City pipeline or had any rights therein and counterclaimed for back water payments and injunctive relief. (R. 60-68)

The trial court made a judgment dismissing the appellant's amended complaint, declaring the validity of Alta's lease and exchange agreements and holding that the appellant's rights against Alta were only as the owner of two shares of stock. (R. 96-97). As to Orem, the court found in effect that the appellant has no right to use or

maintain his connection with the Orem City pipeline or to convey water through the said pipeline or its other diversion works or conveyance facilities. The court denied to Orem City the right to recover the reasonable value of water delivered to appellant during the period November 1, 1962 to October 1, 1967. (R. 97). This appeal is from the judgment dismissing the amended complaint. Orem City has appealed from the adverse ruling on the counterclaim. (R. 107)

STATEMENT OF POINTS

1. The appellant is the owner of a right to use his proportionate share of the water of Alta Spring.

2. The holder of stock in a mutual water company is entitled to receive his proportionate share of the water and the majority has no right over his objection to sell, exchange or otherwise deprive him of it.

3. Alta did not, by the water lease and exchange agreement, have authority to deprive the appellant of his right to use Alta Spring water without his consent.

4. Alta is estopped from interfering with the appellant's water supply.

5. The appellant has a valid and enforceable agreement with Orem for the use of its pipeline and facilities for the carriage of his Alta Spring water.

ARGUMENT

1. THE APPELLANT IS THE OWNER OF A RIGHT TO USE HIS PROPORTIONATE SHARE OF THE WATER OF ALTA SPRING.

The appellant contended at the trial that he has been, since acquiring two shares of stock in Old Alta, the owner of his proportionate share of that corporation's water rights and facilities. Old Alta organized in 1893 was a typical mutual irrigation company. The water rights of its stockholders were pooled for more convenient distribution of water. The factual situation became complicated by the expiration of the Charter of Old Alta in 1943 and the organization of Alta with the same name and articles of incorporation in 1946. See Exhibits 7 and 26.

The appellant bought Certificate No. 224 from one Robert B. Calder in 1948. Calder's certificate was transferred in 1947 from the certificate of Verena C. Crandall, No. 213, dated in 1945. This certificate was issued from Certificate No. 202 dated November 4, 1943. (Ex. 13). It is clear from the evidence that the appellant's certificate represents an interest in the defunct corporation; although it was not purchased until after the old corporate charter expired and the new corporation was organized.

In 1950, two years after the appellant purchased his certificate, a decree was entered in a suit entitled, "*Orem City* v. *Alta Ditch and Canal Co.*, No. 15460", filed in the District Court of Utah County, which involved the ques-

tion as to whether Orem City, a stockholder in the defunct Alta Ditch Co., was entitled to its proportionate share of the water of the same Alta Spring as is now involved in this case. The entire file is in evidence. (Ex. 3). It will be noted that Orem City won its case and the court quieted its title to its pro rata share of the water. In the decree dated March 24, 1950, appears the following significant provision:

> "... 8. That the new Alta Ditch and Canal Company has acquired no title in, or to, the said Alta ditch or water and has no right to control or liquidate said property or rights beyond that which may be accorded to it by common consent of the persons interested, the right to regulate and administer the property for the purposes of liquidation remaining with the old corporation until its winding up in accordance with the provision of this decree . . ." Exhibit 3.

It is clear that in 1950, two years after the appellant had purchased his stock, the new Alta had "acquired no title in, or to, the said Alta ditch or water" and *had* no right to control or liquidate its property "beyond that which may be accorded to it by *common consent* of the persons interested. . . ." (Emphasis added).

The testimony of James Ferguson is uncontradicted that *since 1950* no transfer of water rights has been made from the old Alta to the new Alta. (Tr. 172). It is also uncontradicted that appellant has made no conveyance of water rights in Alta since the entry of the decree in 1950. (Tr. 72)

Thus, the appellant has two bases for his claim to ownership of his pro rata share of Alta Spring water, both based upon ownership of Certificate No. 224, (1) his position as successor to a stockholder in the old corporation, and (2) his position as a shareholder in a mutual irrigation company.

2. THE HOLDER OF STOCK IN A MUTUAL WATER COMPANY IS ENTITLED TO RECEIVE HIS PROPORTIONATE SHARE OF THE WATER, AND THE MAJORITY HAS NO RIGHT OVER HIS OBJECTION TO SELL, EXCHANGE, OR OTHERWISE DEPRIVE HIM OF IT.

The Supreme Court of Utah has held in a long line of cases, going back nearly 60 years, that a mutual water company is not like an ordinary business corporation. A mutual company is essentially a corporate water master. It is created normally to manage, distribute and control the water. While it may take legal title to the water right, the equitable title remains in the stockholders. Thus, stock in a mutual company is not treated as personal property, but it is frequently held to be appurtenant to land. The stockholders are tenants in common of the water, and it was never contemplated that the corporation would have the authority to sell the water right or otherwise deprive any other stockholder of his proportionate share of the water. At the outset, we direct the court's attention to the corporate purpose, as stated in the articles. In this regard the articles of the old Alta Ditch and the articles of the new Alta Ditch are the same,

and this corporate purpose clearly constitutes each of these companies a typical western mutual water company. The articles provide:

> "That the object, business and pursuit of said Corporation is, and shall continue to be, to carry on and conduct the business of making working and maintaining ditches and canals and waterways, and particularly the "Alta Ditch and Canal" for the carrying and conducting of water for the irrigation of lands, farms, orchards and gardens, for the use of and propelling of machinery for mill and mining purposes, and any, every and all other useful and lawful purposes for which such ditches, canals, or reservoirs and water can or may be used." (See Article IV, Ex. 26, and Article III Ex. 7)

There are many cases from the Utah Supreme Court which make the distinction noted above. In *East River Bottom* v. *Boyce,* 102 Utah 149, 128 P. 2d 277 (1942), the court noted that the only legal basis upon which stock could be issued in a mutual company was by signing the articles and presumptively upon a showing that such person was the owner of a water right which he could exchange for the stock. In that case the company had originally issued Certificate No. 7, representing 7 shares of stock. Later a purchaser of that stock, without surrendering it to the company, induced the company to issue in lieu thereof Certificate No. 56. Thus, two separate certificates were outstanding, each representing the same seven shares of stock. Ultimately the entire 14 shares were delivered to a bank as security for a loan. The water company then took the position that 7 shares

had been erroneously issued, and were void. In upholding the irrigation company's position the Utah Supreme Court held that the mutual irrigation company had only the power and authority to manage, control and distribute the water; that the company could not issue a certificate of stock without receiving a water right in exchange therefor. Said the court:

> The corporation was a loose sort of a mutual agreement for the unifed management and distribution of the water to the owners. The limited and restrictive words for the purpose of "control, management and distribution" is not a conveyance separating a water right appurtenant to land from the land and does not vest the title or right of use in the corporation within the provisions of Revised Statutes of Utah 1933, Section 100-1-10 and Section 100-1-11. The company has power or authority only to manage, control and distribute the water. The water right was never severed from the land and is still appurtenant thereto. An examination of the articles of agreement to determine what a stock certificate represented would, either for investment or loan purposes disclose what the certificate actually represented. There is no power of assessment in the original article. The annual expenses were to be submitted to the stockholders and when the proportion of each one was determined he was not to be permittted to use water until his pro rata share of the expenses were paid.
>
> The only legal basis upon which stock could be issued in the company was by signing the articles of incorporation and agreeing to the method of distribution and control *and presumptively upon*

a showing that such person was the owner of a water right in the Provo River as shown by the decree referred to in the articles of incorporation.

The stock certificates constitute a declaration of the proportion of the water to be distributed to the persons to whom they were originally issued upon which regulations for distribution were based. (Emphasis added)

See also *Continental National Bank* v. *Minersville Reservoir and Irrigation Co.*, 73 Utah 243, 273 P. 502 (1928) where the court, after noting the particular articles of incorporation, held that the only method by which anyone could acquire stock in the company was to exchange a water right for the stock, and that an over issue of stock not in consideration for a water right was void.

In *Smithfield West Bench Irrigation Co.* v. *Union Central Life Insurance Co.*, 105 Utah 468, 142 P. 2d 866 (1943), the court expressly said that a mutual company cannot sell any of the water without the consent of the stockholders or for non-payment of dues. This case involved only the water reaching the end of the canal. The court, in recognizing the aforegoing principle said:

The waters of a mutual irrigation company belong to the users, the company being merely a distributing and apportioning trustee. Such was the Logan Northern Company. The water controlled by it may be used by any shareholders, subject only to the regulation thereof by the company for the benefit of the shareholders so none shall be deprived of his rights by the others. *The company cannot sell any of the water with-*

out the consent of the stockholders or for non-payment of dues if the articles of incorporation make the stock liable for such costs and expenses. Likewise the company cannot permit the water to be lost by non-use thereof as long as any shareholder desires to and is in a position to use the water. Water undistributed may be used by any stockholder in a position to use it. The shareholders are in effect owners in common of the waters with certain limitations as between one another governing the use thereof. Each may therefore use any water not being used by any other shareholder, as is the case with other owners in common. *Hough* v. *Porter,* 51 Or. 318, 95 P. 732, 98 P. 1083, 102 P. 728; *Stephens* v. *Beall,* 22 Wall 329, 22 L. Ed. 786; *Burbank* v. *Crooker,* 7 Gray Mass., 158, 66 Am. Dec. 470; *Tuttle* v. *Campbell,* 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; *Mullins* v. *Butte Hardware Co.,* 25 Mont. 525, 65 P. 1004, 87 Am. St. Rep. 430; *Bergere* v. *Chaves,* 14 N. M. 352, 93 P. 762, 51 A. L. R., N. S., 50, affirmed in *Chaves* v. *Bergere,* 231 U. S. 482, 34 S. Ct. 144, 58 L. Ed. 325.

In *Genola* v. *Santaquin City,* 96 Utah 88, 80 P. 2d 930 (1938), the court said that a stockholder in a mutual company has "a right to demand and receive his aliquot share of the water being distributed by the company in the proportion that his stock bears to all stock." The court said that, "Water rights are pooled in a mutual company for the convenience of operation and more efficient distribution, and perhaps for more convenient transfer. But the stock certificate is not like the stock certificate in a company operated for profit. It is really a certificate showing an undivided part ownership in a

certain water supply. It embraces the right to call for such undivided part according to the method of distribution."

The court recently quoted with approval from this holding in *St. George City* v. *Kirkland, et al,* 17 Utah 2d 292, 409 P. 2d 970 (1966).

In *Salt Lake City* v. *East Jordan Irrigation Co.,* 40 Utah 126, 121 P. 592 (1911), the Supreme Court applied these principles in a damage suit. Salt Lake City had condemned the right to enlarge the existing canal of the irrigation companies. The court was concerned with whether or not the irrigation company could collect for the damages suffered by the individual stockholders while the water was out of the canal. The Supreme Court held that the company could not make such a recovery, and in so holding said:

> While the water users who are also stockholders of the respondent undoubtedly will be bound by any judgment that may be rendered in this proceeding so far as it in any way affects the rights of the respondent as a corporate entity and as it may affect the stockholders as such, yet the stockholders cannot be bound in case appellant invades what is purely the private right of the stockholder, and in that way damages him in a matter which does not affect the corporation. The corporation does not represent the stockholder in his private rights or affairs, and hence cannot bind him, although it seeks to do so in an action or proceeding to which he is not a party. Let us apply the foregoing principle to this case. Assuming that A. as a stockholder of respondent, and a water

user under the canal, has 500 head of cattle which must be watered daily; that in entering upon the canal and enlarging it appellant so interferes with the diversion of the water from the canal that A. cannot obtain any water therefrom, and is compelled to obtain water for his cattle elsewhere for the space of a week or ten days, or until appellant has again placed all of the diverting appliances in place, so that A. may again obtain water as before, and that A., by reason of having to obtain water elsewhere or for any other reason directly attributable to appellant's interference with the diversion of water, is damaged to the extent of $500, assuming now that respondent receives these damages in this proceeding and turns the same into its treasury — how will A. obtain recompense for his injuries? Again may it not be, indeed, would it not be almost impossible to be otherwise than, that some stockholders as water users are damaged more than others, and that the damages, if any, may not all be controlled or governed by the amount of stock any one of them holds in the corporation? If, therefore, the respondent is permitted to prove and recover any special damages that any individual stockholder may suffer, then such stockholders as may not have suffered any damages may nevertheless be benefited by receiving out of the treasury of respondent a portion of the damages that are suffered by the other stockholders. In other words, the corporation is permitted to recover for the benefit of all the stockholders that which only a few may have suffered, and where no two may have suffered to the same extent. For the foregoing reasons we think the rule that a judgment against the corporation binds the stockholder only in matters which directly affect the corporation

> in its rights and liabilities is manifestly sound. Upon both the questions involved in special findings 2 and 3, therefore, we think the evidence should be confined to matters which may affect and damage the corporation in its rights, since such special damages as will be suffered by the individual stockholders in their individual rights cannot be adjusted in this proceeding, since the proceeding is intended to fix and adjudicate the damages respondent will suffer, and not those that others may sustain who are not parties to the proceeding. It would be unjust to require appellant to pay to respondent what belongs to another, and especially in a case where the loss can only be ascertained when the rights of such other are interfered with. We are clearly of the opinion, therefore, that the trial court proceeded upon a wrong theory with regard to the measure of damages.

This principle was recently considered in *Gunnison-Fayette Canal Co.* v. *Gunnison Irrigation Co.,* Case No. 11209, decided December 5, 1968, and not yet reported. The court, by a three-two decision, permitted the irrigation company to collect damages for loss of water, but the majority in so holding stated that the suit was not brought for damage to crops, but rather for the loss of water, and that if the plaintiff corporation recovered for the value of the water, it would hold the proceeds of the judgment in trust for its stockholders.

In re. Johnson's Estate, 64 Utah 114, 228 Pac. 748 (1924) quoted with approval from an Idaho case *Ireton* v. *Idaho Irr. Co.,* 30 Idaho 310, 164 Pac. 687) as follows:

"It is contended by appellant that the shares of stock in the operating company are personal property, and that the water right passed by assignment of them, and did not become subject to the mortgage on the land. While shares of stock in an ordinary corporation, organized for profit, are personal property (section 2747, Rev. Codes; *State* v. *Dunlap,* 28 Idaho, 784, and cases therein cited on page 802, 156 Pac. 1141), and while this court has held shares in an irrigation company to be personal property (*Watson* v. *Molden,* 10 Idaho, 570, 79 Pac. 503), the fact must not be lost sight of that a water right is, as heretofore shown, real estate, and that in case of a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right. Such shares are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence. *In re Thomas' Estate,* 147 Cal. 236, 81 Pac. 539; *Berg* v. *Yakima Valley Canal Co.,* 83 Wash. 451, 145 Pac. 619, L. R. A. 1915D, 292."

The court also quoted with approval from a California case *Woodstone M. & T. Co.* v. *Dunsmore C. W. Co.,* 47 Cal. App. 72, 190 Pac. 213, as follows:

"Where the owners of water rights appurtenant to their several tracts of land formed a mutual corporation and transferred their water rights to the corporation in exchange for stock representing the right to water, the water right remained appurtenant to the land notwithstand-

ing the formal change in ownership and passed to a mortgagee of the land and appurtenant water rights as against a subsequent execution buyer of the stock which still stood on the corporate books in the name of the mortgagor."

The court noted a Utah case (*George* v. *Robison,* 23 Utah 79, 63 Pac. 819, 1901) and said that its decision was based largely upon the argument that shares of stock representing the water rights in question were personal property, and said:

> "But we think the rule is not absolute, and should not apply to shares of stock in an irrigation company which is not organized for profit but for the convenience of owners of water rights in the regulation and distribution of the water to which they are entitled. This distinction was not considered in the opinion of the court and there were other controlling factors in the case, for which reason the general rule there expressed should be modified, when applied to a case like the one at bar."

In *Arnold* v. *C. & R. Association,* 64 Utah 534, 231 P. 622, (1924) the court, in commenting on the rights of stockholders in a mutual company, said:

> Counsel, however, overlooks the all-important fact that the members of the defendant, as water users, stand on precisely the same footing, and that each one is entitled to his proportion or pro rata share of water that is fit for irrigation and domestic and culinary use. There are no primary or secondary rights with regard to those water users. If counsel's contention should prevail, the members receiving water out of the Huntington

> canal and the North ditch would obtain the use of water which is fit for the purposes aforesaid, while those farther down the stream would have to be content with water that is totally unfit for use. The lower water users would thus be deprived of the use of water. Only a part of defendant's members would thus be served with water responding to their needs. If, therefore, there is seepage water, which, through no fault of the lower water users, is made unfit for use, and for that reason must be permitted to run to waste, each one of the defendant's members must bear his proportionate share of the loss. No other conclusion is permissible or defensible.

In the case of *Baird* v. *Upper Canal and Irrigation Co.*, 70 Utah 57, 257 P. 1060 (1927), a petition for a writ of mandamus was filed to compel a corporation to permit a stockholder to connect her pipeline to the corporation water system. The district court granted the writ of mandamus and the water company appealed. The corporation refused to permit the shareholder to make the desired connection because the stockholder proposed to take the water from the area irrigated by the corporation canal system.

It was held that where a stockholder sought to compel a corporation to permit her to connect her pipeline to the corporation water system that in absence of any arrangement to the contrary the water in the mutual corporation must be delivered to the stockholder in proportion to the stock owned and that the corporation could not refuse to deliver water merely because the stockholder desired to use the water in an area outside of the

area embraced within the irrigation system of the water corporation. The Board of Directors owes the duty to distribute to each stockholder his proper proportion of water available for distribution.

The cases cited above clearly support the appellant's position that he is the owner, by virtue of his stock ownership of his aliquot share of the water of Alta Spring. The trial court erred in holding, in effect, that the appellant did not own such share of spring water, but that all the water belonged to Alta, and could be disposed of by that company as it saw fit. That the trial court erred in so holding is clear, because there has never been a conveyance of title of the water right from the old Alta Ditch to the new Alta Ditch, (See the testimony of James Ferguson Tr. 172) and because even assuming such conveyance, both companies were mutual irrigation companies. They were only corporate water masters with the power to manage and distribute the water. The company had no such right as would permit it to exchange the appellant's share of the pure spring water for water not suited for domestic use.

3. ALTA DID NOT, BY THE WATER LEASE AND EXCHANGE AGREEMENT HAVE AUTHORITY TO DEPRIVE THE APPELLANT OF HIS RIGHT TO USE ALTA SPRING WATER WITHOUT HIS CONSENT.

The appellant having established a water right in Alta Spring, it is clear that such right could not be contracted away without his consent.

The exchange agreements between Alta and Orem covering both the summer water and the winter water are in evidence. Exhibits 4, 5 and 6. The obvious purpose of the exchange was to make available to Orem the superior quality spring water. (Tr. 222, 223) The testimony of Engineer Brown, witness for the defendants, is that Alta Spring water as now gathered, transported and treated meets public health standards, and that water pumped out of the end of the Alta ditch is contaminated. (Tr. 226).

The testimony of Cecil Ferguson, water master and witness for Alta, is definite that the only water *not involved* in the exchange with Orem is the Orem City water and the water represented by the appellant's two shares of stock. (Tr. 295, 296). The appellant testified that since 1949, without interruption, he has diverted water out of the Orem pipeline for use on his property which includes domestic use in his home, livestock water and water for irrigation sprinkling. By practice over nearly 20 years, the appellant's water has been effectually severed from the remainder of the Alta water, and the appellant has enjoyed use of his water through a separate system for a purpose different from the irrigation purpose which Deer Creek water will just as well serve. (Tr. 76, 83, 151, 152).

There is no evidence that the appellant consented to the water lease and exchange agreements or in any manner ratified them. The checks representing the dividends which were sent to him have been promptly re-

turned to Alta with the correct comment that they did not belong to him. (Tr. 95, 96). The appellant has always received his water without question, and in fact, the water master, Cecil Ferguson, during an interim period between the expiration of the old agreement and its renewal, arranged for the interruption of irrigation turns to assure a steady supply of water for the appellant through the Orem City pipeline. (Tr. 295, 296). Mr. Ferguson testified that it was the practice to measure the Alta Spring water at the head house. At times when the water was diverted at the head house, the Orem water and the appellant's water represented by his two shares went down the Orem City pipeline. Orem got all of the appellant's water which was not diverted to his property. (Tr. 296).

Absent consent of the appellant, Alta could not contract away the water right of the appellant in Alta Spring which had by common consent and practice been given a separate status. This is the case whether this right of the appellant is a part of the water belonging to Old Alta, or a proportionate part of the water being distributed by common consent by the new Alta.

4. ALTA IS ESTOPPED FROM INTERFERING WITH THE APPELLANT'S WATER SUPPLY.

There is *no conflict* in the evidence as to the facts and circumstances under which the appellant's pipeline system was constructed. It is alleged in the Amended Complaint in paragraph 9 that the defendants and each

of them have, since 1949, acquiesced in the diversion of Alta Spring water by the appellant and have stood by while he expended a large sum of money for his water system. (R. 51). This allegation was denied. (R. 62, 71).

The appellant testified that in 1949 he was at the site while the diversion from the Orem line was being constructed in the company of Jim Ferguson, Merrill Crandall and Howard Ferguson. (Tr. 67, 68). Mr. Ferguson was then and still is the president of Alta. (Tr. 163). He was also president of Old Alta. (Tr. 171). Howard Ferguson, who was also a director, made a deal to rent 1¾ shares of the appellant's water with the understanding that the other ¼ share would run down the pipeline to supply the appellant's stockwatering and irrigation needs. (Tr. 64, 69). The arrangement lasted for seven years and then a similar deal was made with appellant's witness, Richard P. Anderson, for one year. (1957). (Tr. 65, 156).

Mr. James Ferguson, Alta president, recalled the meeting at the diversion site, testified that he had known all about the appellant's pipeline and the fact that he had been getting Alta Spring water since 1949. (Tr. 167, 169). There could be no better proof of knowledge, acquiescence, and expenditure of large sums of money in reliance on Alta's special treatment of the appellant's water entitlements than appears in the record in this case. The rule of equitable estoppel must be applied to prevent manifest injustice.

That knowledge of an officer of a corporation is attributed to a corporation is settled law. This rule applies even though the knowledge is not communicated to the corporation.

19 C.J.S. p. 613, section 1078.

Pacific Digest, Key 482.

Strohecker v. *Mutual Bldg. & Loan Ass'n.*, 55 Nev. 350, 34 P.2d 1076.

Mary Jane Stevens Co. v. *First Nat. Bldg. Co.*, 89 Utah 456, 57 P.2d 1099.

The rule on equitable estoppel is stated as follows:

> "A person who, with knowledge of the facts and of his rights acquiesces in or ratifies an act or transaction is estopped to repudiate such act or transaction as against one who is misled to his prejudice." 31 C.J.S., page 589, section 114.

The rule is stated in Pomeroy's Equity Jurisprudence, Fourth Edition, Vol. 2, page 1680, section 818 as follows:

> "Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. A most

important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like . . ."

This species of estoppel applies to corporations in their dealings with third persons.

Pomeroy's Equity Jurisprudence ,Vol. 2, page 1681, section 819.

5. THE APPELLANT HAS A VALID AND ENFORCEABLE AGREEMENT WITH OREM FOR THE USE OF ITS PIPELINE AND FACILITIES FOR THE CARRIAGE OF HIS ALTA SPRING WATER.

Orem City and Metropolitan Water District of Orem were joined as defendants because they were parties to the water lease and exchange agreement affecting Alta Spring water. It will be noted that those agreements purport to lease and exchange all of the water distributed by Alta. Orem contends that this included the appellant's water and that, therefore, the continued use of the water by him was illegal and he should pay for it. Orem City was also joined as a defendant because it has repudiated an agreement with the appellant for the use of the City pipeline.

The history of the transaction between the appellant and Orem City is disclosed largely by the minutes of the

City Council of Orem City for the period from August 30, 1948, to the date of the filing of the suit. The minutes of the meeting of October 12, 1949, are very significant because both Orem City and the appellant operated under them for some seventeen years before the present suit was filed. They read:

> "Dean E. Park was present to ask the Council to consider him tapping the 14-inch pipe line as proposed from the basin to the diversion unit just above the storage tank and running a line to his bowl for irrigation purposes. Mr. Park owns two shares of Alta Water and wished to have the City include his water with theirs and use it in regular turns each week, taking out the equivalent of two shares from the pipe line through a meter and if more water is used then he would be charged for it. He was told that it was felt that the project could be worked out by a State Engineer and the City Engineer and that it would probably be agreeable with the Council."

Three days after the meeting of October 12, work on construction of the diversion began with City Engineer Beckman acting as the designer of the diversion works and the supervisor of construction. (Tr. 66, 67). From 1949 to October 3, 1960, I find no minutes pertinent to the case. On October 3, 1960, the appellant's water connection was mentioned and "tabled for further research." (Ex. 12, p. 2). On May 8, 1961, the minutes show that the appellant appeared at the City Council meeting and reported the arrangement between him and the City, which report is substantially the same as his testimony in this case. (Ex. 12, pp. 2, 3). On July 17, 1961,

the City Council decided to have a contract drawn up between the appellant and Orem City and directed its attorney to proceed. (Ex. 12, p. 3). The minutes of November 4, 1963, disclose that Attorney Wentz was directed to bring to the Council a copy of an agreement he had sent to the appellant for signing. (Ex. 12).

Mr. Wentz was called by the appellant as a witness and he produced a draft of an agreement which was offered and received in evidence, which very significantly provided that the appellant would transfer to the City his water right and pipeline and would then be entitled to take the quantity of water represented by his two shares of Alta water out of the Orem line. He would pay for any quantity so taken *in excess of the water entitlement of the 2 shares.* (Ex. 27). It will be noted that this was the substance of the minute of October 12, 1949, quoted above.

Another significant fact confirming the arrangement is that Orem did not bill the appellant for water from 1949 to August 1, 1966 (except for one bill for $7.50 about which there is a conflict of testimony), (Tr. 73, 74), although Frank Ferguson testified he had read the appellant's water meter regularly from 1960 to 1967. (Tr. 257-259). If the appellant was just an ordinary water customer, why did the City fail to send a bill? The obvious answer is that both parties were operating under the arrangement reflected in the minutes.

The water was metered after 1958, and meter readings of the water taken by the appellant since 1962 and

records of measurements of the yield of Alta Spring are in evidence. (Ex. 11, 38, 39).

Mr. Beckman, former City Engineer of Orem City, made calculations based on the measurements in the record and testified that during the period of measurement, the appellant diverted 18,024,757 gallons less than his entitlement from Alta Spring. (Tr. 276-278). This excess water went down the pipeline into the Orem City system. (Tr. 276). Based on City rates in evidence, the value of this water was substantial.

CONCLUSION

It must be concluded:

1. The appellant owned a proportionate part of the water of Alta Spring based on his ownership of two shares of stock in Old Alta.

2. The appellant's water was not included in the water exchange between Orem and Alta, because he did not consent to lease or to exchange his part of the Alta Spring water.

3. The appellant spent large sums of money to connect to the Orem pipeline and to carry his water to the place of use with the knowledge and acquiescence of Alta. Alta is now estopped to deny the severance of appellant's water from the other water of the company.

4. Orem City and the appellant have an agreement reflected in the minutes that the appellant could carry

his Alta Spring water in the Orem City pipeline and would pay for water in excess of his entitlement as a shareholder in Alta.

5. Orem City has had the use of more than 18,000,000 gallons of appellant's water since 1962.

6. The agreement for use of the Orem pipeline is valid and is in full force and effect.

It is respectfully submitted that the judgment of the trial court denying appellant the relief prayed for in his amended complaint should be reversed.

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